No. 455

United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

HENRY J. RIPPERGER, as Receiver of UNITED STATES ELECTRIC POWER CORPORATION,
Plaintiff-Appellant,

vs.

A. C. ALLYN & CO. INC., and FIRST BOSTON CORPORATION,
Defendants-Appellees,

SCHRODER-ROCKEFELLER & CO. INC.,
Defendant.

RECORD ON APPEAL.

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United States District Court

SOUTHERN DISTRICT OF NEW YORK. 1

HENRY J. RIPPERGER, as Receiver of UNITED STATES ELECTRIC POWER CORPORATION,

Plaintiff,

against

A. C. ALLYN & Co. INC., SCHRODER-ROCKEFELLER & Co. INC. and FIRST BOSTON CORPORATION,

Defendants.

Civil Action.
File No.
7-426.

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Agreed Statement Pursuant to Rule 76 of the Federal Rules of Civil Procedure.

Plaintiff has appealed from orders dismissing the complaint in this action as to defendants A. C. Allyn & Co. Inc., and First Boston Corporation upon the ground that this action was not brought within the proper venue for the reason that orders of this Court granting motions of those defendants to quash the service of subpoena and dismiss the complaint in a prior suit in this district between the plaintiff herein and said defendants upon the same causes of action, from which orders no appeal was taken by the plaintiff, are *res judicata* as to the right of the plaintiff to bring this suit within this district. Copies of the orders appealed from and the notices of appeal are printed *infra* at pages 5 to 10 and pages 25 to 27 respectively. 3

On May 2, 1938, plaintiff, having been appointed Receiver of the United States Electric Power Corporation, a Maryland corporation, by the Circuit Court of Baltimore City, instituted an action in the United States District Court for the Southern District of New York as

Receiver of said Corporation against various directors, organizers and stockholders of the Corporation, and certain other persons. That action is numbered "E-87-20" and is presently scheduled to go to trial in September, 1940. The complaint in that action, No. E-87-20, set forth various transactions by which, pursuant to an alleged conspiracy, it is claimed the defendants used the assets of the Corporation to their individual profit and to the damage of the Corporation. The complaint in the present action, No. 7-426, contains identical allegations and is based on the same transactions.

The appellees herein, First Boston Corporation and A. C. Allyn & Co. Inc., were named as defendants in action No. E-87-20 and were served with subpoenas and copies of the bill of complaint. First Boston Corporation was and is a Massachusetts corporation and A. C. Allyn & Co. Inc. was and is a Delaware corporation. Both First Boston Corporation and A. C. Allyn & Co. Inc. have designated the Secretary of State of New York as their agent upon whom process may be served, and have been authorized to do business in New York. Such designations were made and authorization secured long prior to the institution by the plaintiff of action No. E-87-20, and have been continuously and still are in effect.

Defendants First Boston Corporation and A. C. Allyn & Co. Inc. duly moved in said action, No. E-87-20, for orders vacating and setting aside the attempted service of subpoenas and complaints upon them and dismissing the complaint as to them upon the ground that the jurisdictional basis of the suit was alleged to be diversity of citizenship and that neither plaintiff nor either of said defendants were inhabitants or residents of the State of New York or of the Southern District of New York. Both motions were unopposed by plaintiff and on June 8, 1938,

Agreed Statement Pursuant to Rule 76 of the Federal Rules of Civil Procedure. 7

and June 13, 1938, orders were entered in said action, No. E-87-20, vacating the service of the subpoenas and complaints and dismissing the complaints as to defendants A. C. Allyn & Co. Inc. and First Boston Corporation respectively. The plaintiff did not appeal from the said orders.

Thereafter, plaintiff instituted similar actions based upon the same transactions against First Boston Corporation and A. C. Allyn & Co. Inc. in the United States District Courts of Massachusetts and Delaware respec- 8
tively, in both of which actions additional defendants are named. Preliminary motions have been made in the said actions, answers have been served and the cases are at issue and pending trial.

Following the decision of the Supreme Court of the United States in the case of *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165, on November 22, 1939, plaintiff instituted the present action in the United States District Court for the Southern District of New York against First Boston Corporation and A. C. Allyn & Co. Inc., alleging that the said defendants have appointed agents within the State of New York for the receipt of process, 9
and joining as an additional defendant, Schroder-Rockefeller & Co. Inc., a corporation which had not previously been sued. In all other respects, the complaint in the present action, No. Civ.-7-426, is similar to the complaint in the original action, No. E-87-20, presently pending in the District Court for the Southern District of New York and the transactions set forth are the same.

Appellees, First Boston Corporation and A. C. Allyn & Co. Inc., by notices of motion dated April 9, and April 5, 1940, respectively, moved for orders

(1) quashing, vacating and setting aside the attempted service of the summons and complaint and

dismissing the complaint as to each of said defendants upon the ground that the action had not been brought within the proper venue for the reason that the causes of action set forth in plaintiff's complaint are the same causes of action set forth in the complaint filed in the said action of the plaintiff against the said defendants (No. E-87-20) in this Court and that the final orders of this Court in said action No. E-87-20 in dismissing said complaint and vacating,
11 setting aside and declaring null and void the attempted service of subpoena against said defendants not having been appealed by the plaintiff are *res judicata* as to the attempted service of summons upon the said defendants herein; and further

(2) dismissing the complaint as to each of said defendants upon the ground that jurisdiction of the subject matter of the present action as against said defendants had been assumed by the Federal District Courts for the Districts of Massachusetts and Delaware respectively and that the District Court for the
12 Southern District of New York should accordingly decline jurisdiction of this action.

The said motions were made upon affidavits of John C. Bruton, Jr., Esq., and Claire W. Hardy, Esq., printed *infra* at pages 11 to 18, the orders above referred to in said action No. E-87-20, printed *infra* at pages 23 and 24, the subpoena and complaint in said action No. E-87-20 and the accompanying exhibits referred to in said notices of motion and affidavits. Defendant Schroder-Rockefeller & Co. Inc. also moved to dismiss the complaint on the ground that it failed to state a claim against said defendant upon which relief can be granted. The affidavit

Orders Appealed From. 13

of Percival E. Jackson, Esq., was submitted in opposition to said motion (printed *infra* at pages 19 to 22).

The motions were opposed by the plaintiff and oral argument was had thereon before Honorable Henry W. Goddard, U. S. D. J. In an opinion dated May 1, 1940, printed *infra* at page 27, Judge Goddard granted the motions of defendants First Boston Corporation and A. C. Allyn & Co. Inc., and thereafter on May 9, 1940 orders, printed *infra* at pages 5 to 10, were signed and entered from which plaintiff has appealed. The motion to dismiss made by defendant Schroder-Rockefeller & Co. Inc. was 14
also granted with leave to file an amended complaint and an order entered thereon on May 9, 1940.

Point to be Relied on by the Appellant.

That the Court erred in holding that the prior dismissals on the ground of improper venue in the action numbered "E-87-20" required a dismissal of the present action as to defendants First Boston Corporation and A. C. Allyn & Co., Inc., upon the principle of *res judicata.*

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Orders Appealed From.

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

Defendant, A. C. Allyn & Co. Inc., appearing specially and solely for the purpose of this motion, having moved this Court by notice of motion, dated April 5, 1940, for an order vacating, quashing and setting aside the attempted

service of the summons and complaint herein on the said defendant and dismissing the complaint herein insofar as the same relates to the said defendant upon the ground that the action has not been brought within the proper venue for the reason that the causes of action set forth in plaintiff's complaint herein are similar to the causes of action set forth in a prior suit instituted by the plaintiff herein against said defendant in this court, which suit bears the designation of Action No. E87-20 and the order of this Court in dismissing the complaint and vacat-
17 ing, setting aside and declaring null and void the service of the subpoena therein upon said defendant upon the ground that said suit was not brought within the proper venue is binding upon the plaintiff herein in the present cause of action as a prior judgment of this court between the plaintiff herein and said defendant upon the same or similar causes of action, and further having moved for an order dismissing plaintiff's complaint as to the "First," "Third" and "Fourth" causes of action therein, as to said defendant upon the ground that jurisdiction of the subject matter of the causes of action set forth in the complaint herein as against said defendant has been
18 assumed by the United States District Court for the District of Delaware in an action pending therein and that this Court should accordingly decline jurisdiction of this action, and said motion having regularly come to be heard,

Now upon reading and filing said notice of motion, dated April 5, 1940, the summons and complaint herein, the subpoena and complaint in an action now pending in this Court, entitled "Henry J. Ripperger, as Receiver of United States Electric Power Corporation, Plaintiff, against Arthur C. Allyn, *et al.*, Defendants, No. E87-20", the affidavit of Claire W. Hardy, Esq., sworn to the 3rd day of April, 1940, with proof of due service thereof, the

exhibits attached to said affidavit including the final order entered in this court on June 8, 1938, in said action No. E. 87-20, dismissing the complaint therein as to the Defendant, A. C. Allyn & Co. Inc., the summons and complaint in an action in the United States District Court for the District of Delaware, entitled "Henry J. Ripperger, as Receiver of United States Electric Power Corporation, Plaintiff, vs. A. C. Allyn & Co. Inc., *et al.*, Defendant No. 14", the affidavit of Percival E. Jackson, Esq., sworn to on the 15th day of April, 1940, with proof of due service thereof and the reply affidavit of Claire W. 20
Hardy, Esq., sworn to on the 16th day of April, 1940, with proof of due service thereof, and after hearing Claire W. Hardy, Esq., attorney for said defendant in support of said motion and Percival E. Jackson, Esq., attorney for plaintiff herein in opposition thereof, and due deliberation having been had, it is

Ordered that the said motion for an order vacating and setting aside the attempted service of the summons and complaint herein on the defendant, A. C. Allyn & Co. Inc., and dismissing the complaint herein insofar as the same relates to the said defendant upon the ground 21
that the action has not been brought within the proper venue for the reason that the causes of action set forth in plaintiff's complaint herein are similar to the causes of action set forth in a prior suit instituted by the plaintiff herein against said defendant in this court, which suit bears the designation of Action No. E87-20 and the order of this Court in dismissing the complaint and vacating, setting aside and declaring null and void the service of the subpoena therein upon said defendant upon the ground that said suit was not brought within the proper venue is binding upon the plaintiff herein in the present cause of action as a prior judgment of this court be-

tween the plaintiff herein and said defendant upon the same or similar causes of action.

ORDERED that the complaint be and the same hereby is dismissed as to defendant, A. C. Allyn & Co., Inc., and the attempted service of the summons and complaint herein on the defendant, A. C. Allyn & Co., Inc. be and the same hereby is vacated, set aside and declared null and void.

Dated, New York, May 9th, 1940.

23 HENRY W. GODDARD,
U. S. D. J.

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

Defendant, First Boston Corporation, appearing specially and solely for the purpose of this motion, having
24 moved this Court by notice of motion, dated April 9, 1940, for an order vacating and setting aside the attempted service of the summons and complaint herein on the said defendant and dismissing the complaint herein insofar as the same relates to the said defendant upon the ground that the jurisdiction of this Court is invoked solely on the ground of the diversity of citizenship and neither the plaintiff nor the defendant, First Boston Corporation, is an inhabitant or resident of the State of New York or of the Southern District of New York, and that it has been conclusively determined between the parties to this action by an order of this Court, dated June 13,

1938, that said defendant, First Boston Corporation, was not and is not subject to suit in the Southern District of New York upon the causes of action set forth in this complaint, and, further, for an order dismissing the complaint as to said defendant upon the ground that jurisdiction of the subject matter of the causes of action set forth in the complaint herein as against said defendant has been assumed by the United States District Court for the District of Massachusetts in an action pending therein bearing No. 462, and that this Court should accordingly decline jurisdiction of this action, and for such other and further relief as may be proper, and said motion having regularly come on to be heard,

Now, upon reading and filing said notice of motion dated April 9, 1940, the summons and complaint herein, the subpoena and complaint in an action now pending in this Court entitled "Henry J. Ripperger, as Receiver of United States Electric Power Corporation, Plaintiff, against Arthur C. Allyn, *et al.*, Defendants, No. E87-20", the affidavit of John C. Bruton, Jr., Esq., sworn to the 9th day of April, 1940, with proof of due service thereof, the exhibits attached to the said affidavit, including the final order entered in this Court on June 13, 1938, in said action No. E87-20, dismissing the complaint therein as to defendant, First Boston Corporation, the complaint in an action in the United States District Court for the District of Massachusetts entitled "Henry J. Ripperger, as Receiver of United States Electric Power Corporation, Plaintiff, against John R. Macomber, Charles D. Makepeace and The First Boston Corporation, Defendants, No. 462" and the motion to amend the said complaint in the said action No. 462, the affidavit of Percival E. Jackson, Esq., sworn to on the 15th day of April, 1940, with proof of due service thereof, the reply affidavit of John C. Bruton, Jr., Esq., sworn to on the 17th day of April,

1940, and the exhibits attached thereto, with proof of due service thereof, and after hearing John C. Bruton, Jr., Esq., of counsel for said defendant, in support of said motion and Percival E. Jackson, Esq., attorney for the plaintiff herein, in opposition thereto, and due deliberation having been had, and upon filing the opinion of the Court, it is

ORDERED that the said motion for an order vacating and setting aside the attempted service of the summons and
29 complaint herein on the defendant, First Boston Corporation, and dismissing the complaint herein insofar as the same relates to the said defendant upon the ground that the jurisdiction of this Court is invoked solely on the ground of diversity of citizenship, and neither the plaintiff nor said defendant is an inhabitant or resident of the State of New York or of the Southern District of New York and that it has been conclusively determined between the parties to this action by an order of this Court, dated June 13, 1938, that said defendant, First Boston Corporation, was not and is not subject to suit in the Southern District of New York upon the causes of
30 action set forth in this complaint, be and the same hereby is granted; and it is further

ORDERED that the complaint be and the same hereby is dismissed as to defendant, First Boston Corporation, and the attempted service of the summons and complaint herein on the defendant, First Boston Corporation, be and the same hereby is vacated, set aside and declared null and void.

Dated, New York, May 9th, 1940.

HENRY W. GODDARD,
U. S. D. J.

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Affidavit of Claire W. Hardy, Esq.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

State of Illinois, }
County of Cook, } ss.:

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CLAIRE W. HARDY, being duly sworn, deposes and says that he is a resident of the City of Evanston, County of Cook and State of Illinois, and is duly admitted to the practice of law before the courts of the States of New York and Illinois.

That he was retained by A. C. Allyn and Company, Inc., as one of its counsel in defending a certain cause of action in the United States District Court, for the Southern District of New York, entitled "Henry J. Ripperger, as Receiver of United States Electric Power Corporation, Plaintiff vs. Arthur C. Allyn, et al., Defendants, No. E. 87-20," and is familiar with the complaint and other 33
pleadings filed in said action. That subpoena and complaint therein were served upon said A. C. Allyn and Company, Inc., on or about May 2, 1938. That on the 24th day of May, 1938, judgment was entered in said action dismissing the complaint therein and vacating, setting aside and declaring null and void the attempted service of the subpoena and complaint therein on the said defendant, A. C. Allyn and Company, Inc., upon the motion of Messrs. Seibert & Riggs, of New York City, in behalf of said defendant. That said motion was made upon the ground that, as shown by the complaint therein, said defendant had been incorporated under the laws of

the State of Delaware and was not within the jurisdiction of the United States District Court for the Southern District of New York for the purposes of said suit. That the plaintiff in said action abided by said judgment and no appeal was taken therefrom.

Deponent further says that thereafter he was retained by A. C. Allyn and Company, Inc., as one of its counsel in defending a certain cause of action now pending in the United States District Court for the District of Delaware, entitled "Henry J. Ripperger, as Receiver of United
35 States Electric Power Corporation, Plaintiff vs. A. C. Allyn & Co., Inc., *et al.*, Defendants, Civil Action File No. 14." That the summons and complaint in said suit were served upon said defendant, A. C. Allyn and Company, Inc., on or about November 3, 1938. That deponent is familiar with the complaint and other pleadings in said action; that an answer to said complaint has been filed in behalf of said defendant, A. C. Allyn and Company, Inc., by deponent and Howard Duane, Esq., of Wilmington, Delaware, as attorneys for said defendant, and said action is now at issue and pending trial in said United States District Court for the District of Delaware.

36 Deponent further says that thereafter he was retained by A. C. Allyn and Company, Inc., as its attorney in defending a certain cause of action now pending in the United States District Court for the Southern District of New York, entitled "Henry J. Ripperger, as Receiver of United States Electric Power Corporation, Plaintiff vs. Arthur C. Allyn, *et al.*, Defendants, Civil Action No. 7-426," and that he is familiar with the complaint which has been filed in said proceeding. That summons and complaint were served upon said defendant, A. C. Allyn and Company, Inc., on or about February 29, 1940.

That the complaint filed in the United States District Court in said suit No. E. 87-20 comprises four alleged

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causes of action; that the complaint filed in the suit in the United States District Court for the District of Delaware in Civil Action File No. 14 comprises three alleged causes of action; that the complaint filed in the United States District Court for the Southern District of New York in Civil Action No. 7-426 comprises four alleged causes of action.

That the alleged causes of action set forth in the complaint filed in the said suit in the United States District Court for the District of Delaware numbered "First," "Second" and "Third" are the same causes of action as 38
those numbered "First," "Third" and "Fourth" in the complaint filed in the suit in the United States District Court for the Southern District of New York numbered E. 87-20, and the last paragraph in each such alleged cause of action in the said suit in the District of Delaware contains the following allegation:

> "That plaintiff herein on or about the 28th day of April, 1938, instituted an action in the United States District Court for the Southern District of New York against the security dealers, their associates and the directors of U. S. Electric Power Corporation, in- 39
> cluding the defendants A. C. Allyn & Co., Inc., and American General Corporation claiming damages and other relief by reason of the facts set forth herein; that said action was dismissed on consent by the plaintiff as to the present defendants upon their motion to dismiss as to them since they were not citizens of the State of New York; that for that reason this action was brought against these defendants in this Court and the other security dealers, their associates and the directors are not joined since they are presently parties defendant in said suit pending in the Southern District of New York, or are not subject to the jurisdiction of this Court."

That the causes of action numbered "First," "Third" and "Fourth" in the suit now pending in the United States District Court for the Southern District of New York, No. 7-426, contain the same allegations of fact and are the same causes of action set forth in the complaint in said suit No. 14 now pending in the United States District Court for the District of Delaware. That said causes of action numbered "First," "Third" and "Fourth" in the complaint in the said suit No. 7-426 in the United States District Court for the Southern District of New
41 York are already pending and at issue before a Court of competent jurisdiction, to-wit, the United States District Court for the District of Delaware, of which District the said defendant, A. C. Allyn and Company, Inc., is a resident, and have been so pending for upward of fifteen months prior to the institution of said suit No. 7-426 in the United States District Court for the Southern District of New York.

That the four causes of action set forth in the complaint in the suit now pending in the United States District Court for the Southern District of New York, No. 7-426, contain the same allegations of fact and are the
42 same causes of action set forth in the complaint filed in the suit now pending in the United States District Court for the Southern District of New York, No. E. 87-20, the complaint in which was dismissed and the service of the subpoena therein upon the said defendant, A. C. Allyn and Company, Inc., by judgment of the United States District Court for said District, duly entered, was vacated, set aside and declared null and void. That the said plaintiff abided said judgment and no appeal was taken therefrom by said plaintiff, and the same stands as the judgment of this Court as to any litigation in said District between the said plaintiff and the said defendant, A. C. Allyn and Company, Inc., upon any of the al-

leged causes of action set forth in the complaint in said suit No. E. 87-20.

CLAIRE W. HARDY.

Subscribed and sworn to before me this
3rd day of April, 1940.

ELLEN K. LUNDBY,
Notary Public.

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Affidavit of John C. Bruton, Jr., Esq.

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

State of New York, } 45
County of New York, } ss.:

JOHN C. BRUTON, JR., being duly sworn, deposes and says: I am an attorney at law and a member of the bar of this Court. I am associated with the firm of Sullivan & Cromwell, attorneys for defendant, First Boston Corporation, and am in charge of this action on behalf of the said defendant.

The firm of Sullivan & Cromwell also represented defendant, First Boston Corporation, in another action now pending in this Court entitled, "Henry J. Ripperger, as Receiver of United States Electric Power Corporation,

Plaintiff, against Arthur C. Allyn, *et al.*, Defendants, No. E87-20", and I also was personally in charge of the defense of defendant, First Boston Corporation, in that action. Reference is hereby specifically made to the subpoena and complaint in the said action, and they will be requisitioned from the files of this Court for use on this motion.

As appears from the subpoena and complaint in the said action, No. E87-20, defendant, First Boston Corporation, was named as a defendant in that action. A
47 comparison of the complaint in that action, No. E87-20, with the complaint in this present action, No. 7-426, reveals that the same alleged four causes of action are set forth in each complaint, and that the material allegations of each complaint are identical. The only change is the addition of Schroder-Rockefeller & Co. Inc., as a defendant in the present action, No. 7-426; the causes of action alleged are identical.

As appears from the files of this Court, defendant, First Boston Corporation, appearing specially through Sullivan & Cromwell as its attorneys, moved in said action, No. E87-20, by notice of motion dated May 16,
48 1938, for an order vacating and setting aside the attempted service of subpoena and complaint upon it and dismissing the bill of complaint as to it, upon the ground that the jurisdictional basis of the suit was alleged to be diversity of citizenship and that "neither the plaintiff nor the defendant, First Boston Corporation, are inhabitants or residents of the State of New York or of the Southern District of New York." The said motion was supported by an affidavit of Nevil Ford, a Vice-President of defendant, First Boston Corporation, setting forth the fact that defendant, First Boston Corporation, is a corporation organized and existing under the laws of the State of Massachusetts, and is not and never has been a

citizen, resident or inhabitant of the State of New York or of the Southern District of New York. The motion of defendant, First Boston Corporation, was granted by an order of this Court dated June 13, 1938. For the convenience of the Court, a copy of the said order is annexed hereto marked Exhibit A.

The plaintiff herein, who is also the plaintiff in said action, No. E87-20, took no appeal from the said order dated June 13, 1938, and acquiesced therein. Thereafter, in or about November, 1939, plaintiff commenced an action in the United States District Court for the District 50
of Massachusetts entitled, "Henry J. Ripperger, as Receiver of United States Electric Power Corporation, Plaintiff, against John R. Macomber, Charles D. Makepeace and The First Boston Corporation, Defendants, No. 462," and, upon information and belief, the summons and complaint in said action, No. 462, were served upon defendant, First Boston Corporation. A copy of the complaint in the said action in the United States District Court for the District of Massachusetts, No. 462, is annexed hereto as Exhibit B. Thereafter plaintiff in said action in the United States District Court for the District of Massachusetts, No. 462, made a motion to amend 51
the complaint. A copy of the said motion is annexed hereto and marked Exhibit C. The effect of the said motion is to amend the complaint by correcting certain clerical errors in the preparation of the complaint so that the complaint now sets forth three causes of action.

A comparison of the complaint, as amended, in the said action in the United States District Court for the District of Massachusetts, No. 462, with the complaint in the present action in this district, No. 7-426, indicates that the three causes of action set forth in the Massachusetts action are identical with the first three causes of action set forth in the present action. It further appears from

an examination of the complaint in the present action in this District, No. 7-426, that defendant, First Boston Corporation, is not charged with having participated in any of the acts set forth in the fourth cause of action in the present complaint. The suit pending against defendant, First Boston Corporation, in the United States District Court for the District of Massachusetts is therefore in effect identical with the present action. I am informed by the counsel for defendant, First Boston Corporation, who represent it in the suit in the United States District
53 Court for the District of Massachusetts, that defendant, First Boston Corporation, has moved in that action for a more definite statement and a bill of particulars, and that the plaintiff has furnished an answer to the said motion of defendant, First Boston Corporation, in that action. I am further informed that defendant, First Boston Corporation, has filed its answer in the action in the United States District Court for the District of Massachusetts and that the said action is now pending and at issue.

In view of the facts set forth in this affidavit, I respectfully request, on behalf of defendant, First Boston Cor-
54 poration, that relief be granted as prayed for in the annexed notice of motion.

JOHN C. BRUTON, JR.

Sworn to before me this
9th day of April, 1940.

JOHN W. P. SLOBADIN,
Notary Public, New York County.

(Notarial Seal)

Affidavit of Percival E. Jackson, Esq. 55

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

State of New York, }
City of New York, }ss.:
County of New York, }

PERCIVAL E. JACKSON, being duly sworn, deposes and says: 56

That this affidavit is made in opposition to identical motions made by defendants, First Boston Corporation and A. C. Allyn & Co. Inc. for orders vacating and setting aside the service of a summons on each of them and for an order dismissing the complaint as to each of them.

I am one of counsel for the plaintiff receiver in another action in this Court entitled Henry J. Ripperger, as Receiver of United States Electric Power Corporation v. Arthur C. Allyn, *et al.*, defendants, No. E-87-20. That action was instituted by the Receiver of United States Electric Power Corporation against various directors, 57 organizers and principal stockholders of the corporation charging them with a conspiracy to use the assets of the corporation for their private aims as a result of which the defendants profited, the assets of the corporation were depleted, and it went into insolvency.

This action was instituted in this Court for the reason that most of the defendants were residents and citizens of the State of New York. Among the defendants named in that action were the moving parties in this action, A. C. Allyn & Co. Inc. and First Boston Corporation. We knew, as the complaint in that action alleged (Par. Second, subdivisions [1] and [p]) that A. C. Allyn & Co.

Inc. was a Delaware corporation and First Boston Corporation was a Massachusetts corporation and that by reason of that fact, both of these defendants could object to the venue of this Court. However, the defendants could consent to be sued in this District, in which event the jurisdiction of this Court would be unquestioned. If they did not consent to appear, it would be necessary to start actions against them elsewhere. Nevertheless, since they were proper parties to the action involving the charges made therein and it seemed in the interests of all
59 that the issues raised be disposed of in one suit, these defendants were joined.

As appears from the moving papers, each of these defendants moved for an order vacating and setting aside the service of a subpoena upon them and for an order dismissing the bill of complaint upon the ground that neither the plaintiff nor the defendant were inhabitants or residents of the State of New York or of the Southern District of New York. These motions were unopposed and the Court entered orders vacating the service of the subpoenas and dismissing the complaint as to them. Thereafter, similar actions were instituted by the re-
60 ceiver against each of these defendants in the State of their incorporation.

Thereafter and on November 22, 1939, the Supreme Court of the United States in the case of Neirbo Co. vs. Bethlehem Shipbuilding Corp., 84 L. Ed. 123, in reversing a decision by the Circuit Court of Appeals of this Circuit, held that a foreign corporation which had filed a certificate of doing business with the Secretary of State and had designated an agent within the State for the receipt of process, by reason of such designation had consented to being sued in the Federal Courts of that State and having so consented, could not object to the venue of the Court.

Investigation disclosed that both First Boston Cor-

poration and A. C. Allyn & Co. Inc. had designated agents within the State to receive process, and therefore a new action was instituted in this Court against these defendants and Schroder-Rockefeller & Co. Inc., a corporation which had not previously been sued, predicated on the same issues that are raised in the principal suit pending in this Court and in the suits brought in the States of incorporation of A. C. Allyn & Co. Inc. and First Boston Corporation.

The defendants now move for an order vacating the service of the summons and dismissing the complaints as 62
to them, first, on the basis of the prior ruling dismissing the prior complaints in the action entitled Henry J. Ripperger v. Arthur C. Allyn, *et al.*, and, secondly, on the ground that another action is pending against these defendants in other Federal Courts for the same relief sued herein.

The legal issues raised by this motion are discussed in a memorandum of law that will be submitted in opposition to this motion, and need not be elaborated here.

We should point out, however, that it was our aim in instituting the present action, to make possible a disposition of the issues raised against all of the defendants 63
in a single trial and avoid the delay and expense, to litigants and to the Courts, involved in trying this cause first in this Court, it will be tried this September, and thereafter retrying the action in Delaware and then in Massachusetts. We intend, if this motion is denied, to consolidate the instant action with the principal case and to discontinue the actions pending in Massachusetts and in Delaware. Of course, there will be no element of harassing these defendants by prosecuting suits in two courts. On the contrary, it should be to their interest, as it is to the interest of the Court, that this course of procedure be adopted, for then the whole matter will be disposed of at one time.

Lastly, there is a factual difference between the present complaint and the prior one in the action pending in this Court. The present complaint alleges (Par. Second, subd. [a] and subd. [c]) that the defendant, A. C. Allyn & Co., Inc., and the defendant, First Boston Corporation, each appointed an agent within the State of New York for the receipt of process. The prior complaint contained no such allegation and it is the fact of such designation that, under the decision of the Supreme Court, permits this suit to be brought in this Court. Had the defendants
65 not consented to be sued here by such designation, they could have objected, as they previously did, on the grounds of improper venue.

The defendant Schroder-Rockefeller & Co. Inc. also moves to dismiss on the ground that the complaint fails to state a cause of action as to it, and for certain other relief.

As will appear from the memorandum submitted herewith, the defendant, Bancamerica Blair Corp., in the action entitled Ripperger v. Allyn, made an identical motion based upon the same facts alleged as to that corporation that are now alleged as to Schroder-Rockefeller
66 & Co. Inc. and Judge Patterson held that the complaint stated a cause of action and denied the motion. Judge Leibell, following the decision of Judge Patterson, denied similar motions made by other defendants.

It is respectfully submitted that the three motions to dismiss be denied.

PERCIVAL E. JACKSON.

Sworn to before me this
15th day of April, 1940.

ROGER E. SEIDEL,
Notary Public.

Orders in Prior Action, No. E 87-20. 67

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

HENRY J. RIPPERGER, as Receiver of UNITED STATES ELECTRIC POWER CORPORATION,
Plaintiff,
against
ARTHUR C. ALLYN, *et al.*,
Defendants.
} E 87-20.

68

Defendant, A. C. Allyn & Co., Inc., appearing specially, having moved this Court by notice of motion dated May 16, 1938, for an order dismissing the complaint and vacating, setting aside and declaring null and void the attempted service of the subpoena and complaint herein on said defendant, and said motion having regularly come on to be heard, and upon reading and filing the said notice of motion and the affidavit of L. E. Yeager, verified May 16, 1938, with proof of due service thereof, and after hearing H. Preston Coursen, of counsel for said defendant in support of said motion, and no one appearing in opposition, and due deliberation having been had, Now, 69 and on motion of Seibert & Riggs, attorneys for said defendant, appearing specially and solely for the purpose of this motion, it is

ORDERED, that the said motion be and the same is hereby granted, and it is further

ORDERED, that the complaint be and the same is hereby dismissed as to defendant, A. C. ALLYN & Co., INC., and the attempted service of the subpoena and complaint herein on said defendant, A. C. Allyn & Co., Inc., be and the same is hereby vacated, set aside and declared null and void.

Dated, New York, June 8th, 1938.

ROBERT P. PATTERSON,
U. S. District Judge.

70 *Orders in Prior Action, No. E 87-20.*

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

HENRY J. RIPPERGER, as Receiver of UNITED STATES ELECTRIC POWER CORPORATION,
Plaintiff,
against
ARTHUR C. ALLYN, *et al.*,
Defendants.
} E 87-20.

71

Defendant, First Boston Corporation, appearing specially and solely for the purpose of this motion, having moved this Court by notice of motion dated May 16, 1938, for an order vacating and setting aside the attempted service of the subpoena and complaint herein on the defendant First Boston Corporation, and dismissing the bill of complaint herein in so far as the same relates to said defendant, and said motion having regularly come on to be heard, and upon reading and filing the said notice of motion and the affidavit of Nevil Ford, sworn to the 16th day of May, 1938, with proof of due service
72 thereof, and after hearing John C. Bruton, Jr., Esq., of counsel for said defendant in support of said motion, and no one appearing in opposition thereto, and due deliberation having been had, Now, on motion of Sullivan & Cromwell, attorneys for said defendant, appearing specially and solely for the purpose of this motion, it is

ORDERED, that the said motion be and the same is hereby granted, and it is further

ORDERED, that the complaint be and the same is hereby dismissed as to defendant, First Boston Corporation, and the attempted service of the subpoena and complaint herein on the defendant, First Boston Corporation, be and the same is hereby vacated, set aside and declared null and void, without costs.

Dated, New York, June 13th, 1938.

ROBERT P. PATTERSON,
United States District Judge.

Notices of Appeal. 73

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

HENRY J. RIPPERGER, as Receiver of UNITED STATES ELECTRIC POWER CORPORATION, Plaintiff, against A. C. ALLYN & CO. INC., SCHRODER-ROCKEFELLER & CO. INC. and FIRST BOSTON CORPORATION, Defendants.	Civil Action. File No. 7-426.

74

SIRS:

PLEASE TAKE NOTICE that HENRY J. RIPPERGER, as Receiver of United States Electric Power Corporation, the plaintiff herein, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit, from an order made and entered in the above entitled action on the 9th day of May, 1940, by Hon. Henry W. Goddard, dismissing, vacating and setting aside service of the summons and complant herein on the defendant A. C. Allyn & Co., Inc., and dismissing the complaint as to said defendant. 75

Dated, New York, May 27, 1940.

Yours, etc.,

JACOB K. JAVITS and
PERCIVAL E. JACKSON,
Attorneys for Plaintiff,
68 William Street,
Borough of Manhattan,
City of New York.

76 *Notices of Appeal.*

To:

The Honorable Clerk of the
United States District Court
For the Southern District of New York,

Claire W. Hardy, Esq.,
Attorney for Defendant
A. C. Allyn & Co., Inc.,
% Leland E. Yeager,
77 Room 1301,
40 Wall Street,
New York City.

DISTRICT COURT OF THE UNITED STATES,

Southern District of New York.

[SAME TITLE]

78

Sirs:

Please Take Notice that Henry J. Ripperger, as Receiver of United States Electric Power Corporation, the plaintiff herein, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit, from an order made and entered in the above entitled action on the 9th day of May, 1940, by Hon. Henry W. Goddard, dismissing, vacating and setting aside service of the summons and complaint herein on the defendant First

Boston Corporation and dismissing the complaint as to said defendant.

Dated, New York, May 27, 1940.

Yours, etc.,

JACOB K. JAVITS and
PERCIVAL E. JACKSON,
Attorneys for Plaintiff,
68 William Street, 80
Borough of Manhattan,
City of New York.

To:

The Honorable Clerk of the
United States District Court
For the Southern District of New York,

SULLIVAN & CROMWELL, ESQS.,
Attorneys for Defendant
First Boston Corporation,
48 Wall Street, 81
New York City.

82

Opinion of Hon. Henry W. Goddard, U. S. D. J.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

JACOB K. JAVITS and
PERCIVAL E. JACKSON,
Attorneys for Plaintiff.

83

CLAIRE W. HARDY,
Attorney for Defendant,
A. C. Allyn & Co. Inc.

SULLIVAN & CROMWELL,
Attorneys for Defendant,
Schroder-Rockefeller & Co. Inc.
By John C. Bruton, Jr.

SULLIVAN & CROMWELL,
Attorneys for Defendant,
First Boston Corporation,
By John C. Bruton, Jr.

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GODDARD, District Judge:

(I) Defendants, A. C. Allyn & Co. Inc., and First Boston Corporation have made motions to dismiss the complaint as against them on two grounds:

(a) That a prior order dismissing similar complaints against them on the ground of improper venue is *res judicata;* (b) that similar actions by the plaintiff are

pending in the United States District Courts for the Districts of Delaware and Massachusetts, and that this court should accordingly decline jurisdiction of this action.

Plaintiff is a receiver appointed by the Circuit Court of Baltimore City and is a resident and citizen of the State of Maryland. The moving defendants are incorporated in the States of Delaware and Massachusetts respectively. They were originally named as defendants in action No. E 87-20 which is still pending in this district as to the other defendants and which, it is anticipated, 86
will be reached for trial this coming Autumn. But by final order dated June 13, 1938 action No. E 87-20 was dismissed as to defendant, First Boston Corporation, and by order dated June 8, 1938 it was dismissed as to defendant, A. C. Allyn & Co. Inc. on the grounds that under the provisions of section 51 of the Judicial Code (28 U. S. C. sec. 112) the venue was improper as to them.

Plaintiff took no appeal from these orders but after the decision of the Supreme Court in the case of *Neirbo Co.* v. *Bethlehem Ship Building Corp.*—308 U. S. 165, he began this action. It appears that prior to the inception of action No. E 87-20 and at all times since, both 87
moving defendants have had on file a certificate of doing business in the state and have designated an agent within this state for receipt of process.

The orders of June 13, 1938 and of June 8, 1938 respectively in the prior suit are *res judicata* as to the right of plaintiff to bring suit against the moving defendants in this district upon the cause of action set forth in the first complaint and re-alleged in this complaint. No new material facts are alleged in the complaint in the second suit. This court decided that it did not have jurisdiction and a judgment to that effect was entered. No appeal was taken so that judgment still stands. It

was a judicial determination by the court upon questions of fact and law, which it had jurisdiction to decide.

The plaintiff has no right to litigate the same question twice. *Baldwin* v. *Traveling Men's Assn.*—283 U. S. 522. "The principles of *res judicata* apply to questions of jurisdiction as well as to other issues". *American Surety Company* v. *Baldwin, et al.*—287 U. S. 156 at p. 166. In *Stoll* v. *Gottlieb*—305 U. S. 165 at p. 172, the Supreme Court said—

89 "After a federal court has decided the question of jurisdiction over the parties as a contested issue, the court in which the plea of *res judicata* is made, has not the power to inquire again into that jurisdictional fact."

See also *United States* v. *Moser*—266 U. S. 236; *Chicot County District* v. *Bank*—308 U. S. 371; *Glackin* v. *Zeller* —52 Barbour's Reports (N. Y.) 147.

While a dismissal of an action on the sole ground that the court has no jurisdiction of the subject matter or of the parties is a conclusive determination of the fact that
90 the court lacks jurisdiction, it is not an adjudication of the merits and will not bar another action in the proper tribunal for the same cause; nor will it bar a second suit where the pleader in the prior suit failed to allege some essential jurisdictional fact which later is supplied in a new pleading. It is quite true that if a suit be dismissed solely for lack of jurisdiction because there is no diversity of citizenship between plaintiff and defendant, that plaintiff may bring suit on the same cause of action in the same district if he subsequently becomes a citizen of another state so that diversity of citizenship then exists between plaintiff and defendant; and the dismissal of the first suit is not a bar to the second in the same court.

But in such subsequent suit a different state of facts is presented which alters the situation and calls for a new determination by the court. cf. *Gilmer* v. *City of Grand Rapids*—16 Fed. 708.

In the light of the decision of the Supreme Court in *Neirbo* v. *Bethlehem Shipbuilding Corp.* (*supra*), it may be unfortunate for the plaintiff that he did not take an appeal from the first judgment, but not having done so he is now precluded from raising all objections which were then available to him. *Chicot* v. *Bank, supra.*

To support his contention the plaintiff relies upon 92
Smith v. *McNeal*—109 U. S. 426 and *Bunker Hill & Sullivan Mining & Co. Co.* v. *Shoshone Mining Co.*—109 Fed. 504. In *Smith* v. *McNeal,* the complaint was dismissed for lack of jurisdiction because of the plaintiff's failure to allege an essential jurisdictional fact. In a later suit this omission was corrected and the court in the second suit held that this omission having been supplied, a judgment in the prior suit was not a bar to the second suit. The *Bunker Hill & Sullivan Mining Co. Co.* case seems to go no further than to say that a dismissal for want of jurisdiction is not a judgment on the merits and does not prevent the plaintiff from subsequently 93
prosecuting his action in a court authorized to entertain it.

The motion of the First Boston Corporation and A. C. Allyn & Co. Inc. to set aside the attempted service of the summons and complaint upon them and to dismiss the complaint as to them should be granted.

(II) Defendant, Schroder-Rockefeller & Co. Inc. moves to dismiss on the ground that the complaint fails to state a cause of action against it upon which relief can be granted. In the alternative—to require plaintiff to furnish a more definite statement of the causes of action al-

leged against it, or to furnish a bill of particulars supplying certain information so that it may properly prepare its answer. Schroder-Rockefeller & Co. Inc. is sought to be held liable only for the facts alleged in the Fourth cause of action of the complaint and the sufficiency of a similar Fourth cause of action has been upheld by Judge Patterson and Judge Leibell in opinions dated June 22, 1938 and July 26, 1938 respectively. See *Ripperger* v. *Allyn*—25 Fed. Supp. 554. However, the facts are not the same; there is this difference in the situ-
95 ation with respect to Schroder-Rockefeller & Co. Inc. and the defendants who tested the complaint before Judge Patterson and before Judge Leibell. The last wrongful act for which the moving defendants are sought to be held liable is alleged to have occurred on May 21, 1936 and Schroder-Rockefeller & Co. Inc. was not incorporated and did not come into existence until July 7, 1936. I think, therefore, that as to this defendant the complaint as it stands fails to clearly state a claim against defendant, Schroder-Rockefeller & Co. Inc. on which relief may be awarded, and the motion to dismiss should be granted with leave to plaintiff to amend.

96 The motions of defendants, A. C. Allyn & Co. Inc. and of First Boston Corporation, to dismiss the complaint as to each of them is granted.

The motion of defendant, Schroder-Rockefeller & Co. Inc. to dismiss the complaint is granted with leave to plaintiff to amend his complaint.

Settle orders on notice.

May 1, 1940.

HENRY W. GODDARD,
U. S. D. J.

97

Stipulation as to Record.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned parties to this appeal that the foregoing Record shall constitute the record on appeal herein pursuant to Rule 76 of the Rules of Civil Procedure.

98

Dated: June 5, 1940.

JACOB K. JAVITS, and
PERCIVAL E. JACKSON,
Attorneys for Henry J. Ripperger, as Receiver of
United States Electric Power Corporation,
Appellant.

CLAIRE W. HARDY,
Attorney for A. C. Allyn & Co., Inc.,
Appellee.

SULLIVAN & CROMWELL,
Attorneys for First Boston Corporation,
Appellee.

99

Approval of Record by District Court.

The foregoing statement and record pursuant to Rule 76 of the Rules of Civil Procedure are hereby approved.

Dated: June 5, 1940.

HENRY W. GODDARD,
District Judge.

100

Certification of Record.

UNITED STATES OF AMERICA
SOUTHERN DISTRICT OF NEW YORK } ss.:

[SAME TITLE]

I, GEORGE J. H. FOLLMER, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby CERTIFY that the foregoing is a
101 correct transcript of the record of the said District Court in the above-entitled matter as agreed upon by the parties.

IN TESTIMONY WHEREOF I have caused the seal of the said Court to be hereunto affixed at the City of New York, in the Southern District of New York, this 5th day of ~~May~~ JUNE in the year of our Lord, one thousand nine hundred and forty and of the Independence of the said United States the one hundred and sixty-fourth.

GEORGE J. H. FOLLMER,
Clerk.

102

[SEAL]

[fol. 35] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1939

No. 406

(Argued June 19, 1940. Decided July 15, 1940)

HENRY J. RIPPERGER, as Receiver of United States Electric Power Corporation, Plaintiff-Appellant,

vs.

A. C. ALLYN & Co., INC., and FIRST BOSTON CORPORATION, Defendants-Appellees; Schroder-Rockefeller & Co., Inc., Defendant

Appeal from the District Court of the United States for the Southern District of New York

The plaintiff appeals from two orders dismissing his complaint as against A. C. Allyn & Co., Inc. and First Boston Corporation, respectively. Affirmed.

Before Swan, Clark and Patterson, Circuit Judges

[fol. 36] Jacob K. Javits and Percival E. Jackson, Solicitors for Appellant.

Claire W. Hardy, Solicitor for A. C. Allyn & Co., Inc., Appellee.

Sullivan & Cromwell, Solicitors for First Boston Corporation, Appellee.

SWAN, Circuit Judge:

This appeal is submitted upon an agreed statement pursuant to Rule 76, F. R. C. P. The question presented is whether the court erred in holding that orders of dismissal for lack of jurisdiction on the ground of improper venue entered in a prior suit on the same cause of action and in the same court require dismissal of the present suit as against the appellees on the principle of res judicata.

The facts are briefly as follows: In 1938 the plaintiff, as receiver of United States Electric Power Corporation, incorporated in Maryland, brought suit in the district court for the southern district of New York against the directors of said corporation and others, charging a conspiracy to use

the corporate assets for their private profit. Among the defendants named in that suit were A. C. Allyn & Co., Inc., a Delaware corporation, and First Boston Corporation, a Massachusetts corporation. As neither of the corporations nor the plaintiff was a citizen or resident of New York, they respectively moved to vacate service of summons and to dismiss the complaint as to them for lack of jurisdiction on the ground of improper venue. These motions were granted. The plaintiff took no appeal from the orders of dismissal. Thereafter he instituted similar suits based upon the same transactions against First Boston Corpora- [fol. 37] tion and A. C. Allyn & Co., Inc., in the federal district courts of Massachusetts and Delaware, respectively. These cases are at issue and awaiting trial. After the decision of the Supreme Court in Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U. S. 165, the plaintiff brought the present suit against the appellees and another corporation, Schroder-Rockefeller & Co., Inc., which had not previously been sued. The complaint in the present suit alleges that each of the appellees had designated an agent for service of process within the state of New York. In all other respects the complaint is similar to the complaint in the plaintiff's former suit in the court below and sets forth the same transactions. On motions of the appellees the complaint was dismissed as to them on the ground that the orders of dismissal in the former suit are res judicata on the question of the district court's lack of jurisdiction for want of venue in the present suit. By this appeal the plaintiff seeks to reverse that holding and, if he succeeds, he intends to apply for an order consolidating for trial the present action with his former action, which is still pending against other parties and is expected to come to trial next September.

The appellant concedes, as he necessarily must on the authorities, that a decision in favor of jurisdiction is res judicata and invulnerable to collateral attack, even though the ground on which the decision was rested has subsequently been overruled. See United States v. Moser, 266 U. S. 236, 242; Baldwin v. Iowa State Traveling Men's Assn., 283 U. S. 522, 524; American Surety Co. v. Baldwin, 287 U. S. 156, 166; Chicot County District v. Baxter State Bank, 308 U. S. 371, 376; Sunshine Anthracite Coal Co. v. Adkins, 310 U. S. ——; Sorenson v. Sutherland, 109 F. 2d 714, 718 (C. C. A. 2), cert. granted sub nom. Jackson v.

Irving Trust Co., 310 U. S. ——. But he advances the contention that a decision that jurisdiction is lacking leaves the parties as though no action had ever been brought and [fol. 38] therefore presents no bar to a subsequent action even in the same court. We think the argument ingenious but unsound. A court has power to determine whether or not it has jurisdiction of the subject matter of a suit and of the parties thereto. As Mr. Justice Brandeis remarked in American Surety Company v. Baldwin, supra, "The principles of res judicata apply to questions of jurisdiction as well as to other issues." No reason is apparent why the rule should be less applicable to a decision denying jurisdiction than to one sustaining it. The case of Rand v. United States, 48 F. 357, at 358 (D. C. Me.) affirmed in 53 F. 348 (C. C. A. 1) without discussion of the point, appears to support the appellant's position, but we respectfully disagree with it. Compare Armour & Co. v. Kloeb, 109 F. 2d 72 (C. C. A. 6), cert. granted 310 U. S.

The other cases relied upon by the appellant are readily distinguishable. It will suffice to refer to Smith v. McNeal, 109 U. S. 426. There the first suit was dismissed because the complaint did not allege the requisite jurisdictional facts, and the dismissal was held to be no bar to a second suit in the same court in which the complaint did state them. But in the case at bar both complaints are alike except for the non-jurisdictional allegation in the second complaint that the appellees had respectively appointed an agent for service of process within the state of New York. Such appointment antedated the first suit. Improper venue is a waivable defense, and no allegation as to venue is required in the complaint. Note 3 to Official Form 2, following Federal Rules of Civil Procedure; 1 Moore's Fed. Prac. 470. Whether the designation of a statutory agent for service of process constituted a consent to be sued in the district court for the southern district of New York was a question necessarily involved in the controversy presented by the motions to dismiss the first complaint as against the [fol. 39] present appellees, and the fact of such designation could have been shown by affidavit, as it was in Neirbo Co. v. Bethlehem Shipbuilding Corp., supra. There has been no change in the facts upon which the venue privilege depends. The orders of dismissal in the former suit necessarily determined that the defense of improper venue had

not been waived. No appeal having been taken, the former decision stands as a conclusive determination of that issue between the parties.

Orders affirmed.

[fol. 40] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 1st day of August one thousand nine hundred and forty.

Present: Hon. Thomas W. Swan, Hon. Charles E. Clark, Hon. Robert P. Patterson, Circuit Judges.

HENRY J. RIPPERGER, as Receiver of United States Electric Power Corp., Plaintiff-Appellant,

vs.

A. C. ALLYN & Co., INC., and FIRST BOSTON CORP., Defendants-Appellees

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the orders of said District Court be and hereby are affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

D. E. Roberts, Clerk.

[fol. 41] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Henry J. Ripperger, as Receiver, etc., vs. A. C. Allyn & Co., Inc., and First Boston Corporation. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Aug. 1, 1940. D. E. Roberts, Clerk.

[fol. 42] UNITED STATES OF AMERICA, SOUTHERN DISTRICT OF NEW YORK

I, D. E. Roberts, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 41, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Henry J. Ripperger, as Receiver of United States Electric Power Corp., Plaintiff-Appellant, against A. C. Allyn & Co., Inc., and First Boston Corp., Defendants-Appellees, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 10th day of September, in the year of our Lord one thousand nine hundred and forty, and of the Independence of the said United States the one hundred and sixty-fifth.

D. E. Roberts, Clerk. (Seal.)

No. 455

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

HENRY J. RIPPERGER, AS RECEIVER OF UNITED STATES ELECTRIC POWER CORPORATION, PLAINTIFF-APPELLANT,

v.

A. C. ALLYN & CO. INC., AND FIRST BOSTON CORPORATION, DEFENDANTS-APPELLEES,

AND

SCHRODER-ROCKEFELLER CO. INC., DEFENDANT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

Citations.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. ——

HENRY J. RIPPERGER, AS RECEIVER OF UNITED STATES ELECTRIC POWER CORPORATION, PLAINTIFF-APPELLANT,

v.

A. C. ALLYN & CO. INC., AND FIRST BOSTON CORPORATION, DEFENDANTS-APPELLEES,

AND

SCHRODER-ROCKEFELLER CO. INC., DEFENDANT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

TO THE HONORABLE, THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Henry J. Ripperger, as Receiver of United States Electric Power Corporation, respectfully prays that a writ of certiorari issue to review the decree (R. ~~40~~ 38) of the United States Circuit Court of Appeals for the Second Circuit entered in the above cause on August 1st, 1940 affirming the orders (R. 5-10) of the United States District Court for the Southern District of New

York made and entered the 9th day of May, 1940 vacating and setting aside the attempted service of the summons and complaint in the above cause on the defendants A. C. Allyn & Co. Inc. and First Boston Corporation and dismissing the complaint as to said defendants.

Opinions Below.

The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 35) is reported in 113 F. (2d) 332. The opinion of the United States District Court for the Southern District of New York is not reported but is printed in the Record (R. 28).

Jurisdiction.

The decision of the Circuit Court of Appeals for the Second Circuit was rendered on July 15, 1940 and the order for mandate (R. ~~40~~ 38) was dated and issued on August 1, 1940 and entered on August 2, 1940. Jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C., Section 347[a]).

Question Presented.

The question presented by this appeal is whether a prior dismissal of an action brought against the respondents herein in the District Court for the Southern District of New York for lack of jurisdiction due to improper venue is *res judicata* and available as a bar to the instant action.

Statement.

Petitioner, as Receiver of United States Electric Power Corporation, on May 2, 1938, instituted an action in the United States District Court for the Southern District of New York against various directors, organizers and stockholders of the corporation and certain other persons. Among the defendants named in that action were A. C. Allyn & Co. Inc., a Maryland corporation, and First Boston Corporation, a Massachusetts corporation and these corporations were duly served with subpoenas and copies of the bill of complaint. (R. 1-2) Subsequently, A. C. Allyn & Co. Inc. and First Boston Corporation moved for orders vacating and setting aside the attempted service of subpoenas and complaints upon them on the ground that the jurisdictional basis of the suit was alleged to be diversity of citizenship and that neither plaintiff nor either of said defendants were inhabitants or residents of the State of New York or of the Southern District of New York. Both motions were unopposed and orders were entered on June 8th and June 13th, 1938 vacating the service of the subpoenas and complaints and dismissing the complaints as to the defendants A. C. Allyn & Co. Inc. and First Boston Corporation respectively. No appeal was taken by the petitioner from said orders. (R. 2, 3)

Petitioner thereupon instituted separate actions against A. C. Allyn & Co. Inc. and First Boston Corporation in the United States District Courts of Delaware and Massachusetts respectively, which actions were based upon the same transactions complained of in the original action instituted in the United States District Court for the Southern District of New York. (R. 3)

Subsequently, this Court in the case of *Neirbo* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165, in reversing a decision of the United States Circuit Court of Appeals

for the Second Circuit, held that where a foreign corporation does business in the State and designates an agent for the receipt of process, it consents to being sued in the Federal Courts of that State. (R. 3) Petitioner thereupon instituted the instant action against A. C. Allyn & Co. Inc. and First Boston Corporation in the United States District Court for the Southern District of New York alleging the appointment of agents by said defendants within the State of New York for the receipt of process. In all other respects the complaint in the instant action is similar to the complaint in the original action instituted on May 2, 1938, which is presently pending, as against those defendants who have answered, in the United States District Court for the Southern District of New York and is awaiting trial. (R. 3)

The purpose of petitioner in instituting the present action in the United States District Court for the Southern District of New York was to obtain a consolidation or a joint trial of the instant action with the original action in which twenty-five defendants have appeared and answered and thus dispose of the entire cause in one trial rather than in three.

First Boston Corporation and A. C. Allyn & Co. Inc., by notices of motion dated April 9th and April 5th respectively, moved for orders vacating the attempted service of the summons and complaint and dismissing the complaint as to each of them upon the ground that the prior dismissals as to them in the original action were *res judicata* of the question of venue. (R. 3, 4) These motions were granted by orders of the United States District Court for the Southern District of New York dated May 9, 1940. (R. 5-10) Petitioner thereafter appealed from both orders to the Circuit Court of Appeals for the Second Circuit by notices of appeal dated May 27, 1940. (R. 25-27) On July 15, 1940 the orders of the District Court were affirmed by the Circuit Court and decrees were entered thereon.

Specification of Error to be Urged.

That the Circuit Court of Appeals erred in holding that the prior dismissals on the ground of improper venue in the original action required a dismissal of the present action as to First Boston Corporation and A. C. Allyn & Co. Inc. upon principles of *res judicata.*

Reasons for Granting the Writ.

1. The decision of the Circuit Court of Appeals for the Second Circuit is in conflict with a decision of the Circuit Court of Appeals for the First Circuit on the same matter.

2. The decision of the Circuit Court of Appeals herein is not in harmony with the applicable rule as laid down by this Court and the lower Federal and State Courts.

3. The application of the principle of res judicata to the instant case defeats the purpose of that rule and creates uncertainty in a field of general law of great importance.

1. The opinion of the Circuit Court of Appeals for the Second Circuit recognizes that its holding is in conflict with the only other decision in which the precise issue was raised, (R. 38) the holding of the Circuit Court of Appeals for the First Circuit in *Rand* v. *United States* (C. C. A. 1) 53 F. 348 affirming (D. C. Me.) 48 F. 357. There, as in the instant case, a prior action brought by the plaintiff in the same Court had been dismissed on jurisdictional grounds. Subsequently, the decision of the Circuit Court, on which the District Court had based its prior dismissal, was reversed. Plaintiff instituted a second suit which was sustained on the ground that the prior dismissal for supposed lack of jurisdiction was not a bar to the second suit.

2. The exact issue presented by the instant appeal has not been passed upon by this Court nor have the opinions of either the Circuit Court or District Court below,

nor research by any of the parties to this appeal disclosed any decision in any of the Federal Courts, other than *Rand* v. *United States, supra,* dealing with the precise situation. To that extent this appeal presents a question of first impression to this Court.

But the general rule applicable to the instant case is well-established and has never heretofore been questioned. This Court has held that a prior dismissal for want of jurisdiction cannot be pleaded in bar of a subsequent suit (see *Hughes* v. *United States,* 71 U. S. 232) even though the second suit be brought in the same court (*Smith* v. *McNeal,* 109 U. S. 426). The lower Federal and State Courts are in accord. *Mack* v. *United States,* 29 F. Supp. 65, 67.

The Circuit Court below makes a factual distinction of these cases but fails to explain why their reasoning and purpose is not applicable to the instant case. Instead, several recent decisions of this Court* (R. 3[illegible]) are cited for the proposition that "the principles of *res judicata* apply to questions of jurisdiction as well as to other issues."

Each of these cases hold that when a Court in passing upon the issue of jurisdiction resolves it *in favor* of a consideration of the merits of the cause which it then determines, such a judgment subsequently cannot be attacked on the ground that the Court in fact lacked jurisdiction. These cases involve questions entirely foreign to the one presented in the instant appeal. They represent rather a departure by this Court from the early rule that a judgment rendered without jurisdiction is null and void and may be collaterally attacked. They are no authority and, it is submitted, were never intended to be authority for the proposition for which it is sought to employ them—that a *dismissal* of an action for lack of jurisdiction will be *res judicata* and will bar a subsequent suit.

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* *United States* v. *Moser,* 266 U. S. 236; *Baldwin* v. *Iowa State Traveling Men's Assn.,* 283 U. S. 522; *American Surety Co.* v. *Baldwin,* 287 U. S. 156; *Chicot County Dist.* v. *Baxter State Bank,* 308 U. S. 371; *Sunshine Anthracite Coal Co.* v. *Adkins,* 60 S. Ct. 907.

3. The real question presented by this appeal is whether the principle of *res judicata* is to be employed as a means of prolonging and duplicating litigation instead of quieting and terminating it. The effect of the holding of the Circuit Court is not to put an end to this litigation, which involves more than twenty-five defendants, but to compel the petitioner to pursue his remedy in three different forums instead of trying the whole cause in the District Court for the Southern District of New York. The application of the principle of *res judicata* to the instant cause results in a perversion of its long-established and oft-repeated purpose, an application which no other court has ever permitted.

In the cases relied upon by the Court below the effect of the decisions was to further the purpose of the principle of *res judicata*, to put an end to litigation once the court has passed upon the merits of the controversy between the parties. No such purpose is served by the holding of the Circuit Court in the instant cause. The holding in no sense puts an end to the litigation and under the circumstances here present, increases the number of trials from one to three.

Ordinarily, where a suit is dismissed on the ground of improper venue, a plaintiff will seek another forum for his second action, not because the prior dismissal is *res judicata* in the first forum, but for the practical reason that, based on the rule of *stare decisis*, the court in the first forum will again decline jurisdiction unless plaintiff can point to a different reason why the court should entertain jurisdiction. But the second suit should be sustained, though in the same court, if new jurisdictional facts are alleged, as in *Smith* v. *McNeal, supra*, or if the prior dismissal was erroneous as subsequently demonstrated by the holding of or reversal by a higher court, as in *Rand* v. *United States, supra*, or if the statute upon which jurisdiction depends was changed, as in *Cahill* v. *Wissner*, 183 App. Div. 659, affirming 102 Misc. 313.

Conclusion.

It is submitted that this appeal presents this Court with the opportunity of clarifying any ambiguity or uncertainty which its recent decisions denying the right of collateral atack on judgments on jurisdictional grounds may have cast upon the well-established rule that dismissals for want of jurisdiction are not *res judicata* and do not bar a subsequent action. The decision of the Circuit Court below stands alone for the proposition it propounds and is in direct conflict with the holding of the Circuit Court of Appeals for the First Circuit in *Rand* v. *United States, supra.* It contraverts a rule which has long been adhered to by this Court and by the lower Federal and State Courts. It is an application of the principle of *res judicata* which defeats and denies its very purpose.

WHEREFORE, it is respectfully prayed that this petition for writ of certiorari be granted to review the decree of the Circuit Court of Appeals for the Second Circuit confirming the orders of the United States District Court for the Southern District of New York vacating the summons and complaint and dismissing the complaint as to defendants First Boston Corporation and A. C. Allyn & Co. Inc. in the instant action.

Respectfully submitted,

JACOB K. JAVITS, and
PERCIVAL E. JACKSON,
Counsel for Henry J. Ripperger, Petitioner.

September, 1940.

Supreme Court of the United States

OCTOBER TERM—1940.

No. 455.

HENRY J. RIPPERGER, as Receiver of UNITED STATES ELECTRIC POWER CORPORATION,
Petitioner,

vs.

A. C. ALLYN & CO., INC., and FIRST BOSTON CORPORATION,
Respondents,

SCHRODER-ROCKEFELLER & CO., INC.,
Defendant.

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

JACOB K. JAVITS and
PERCIVAL E. JACKSON,
Counsel for Henry J. Ripperger, Petitioner.

October, 1940.

Supreme Court of the United States

OCTOBER TERM—1940.

HENRY J. RIPPERGER, as Receiver of UNITED STATES ELECTRIC POWER CORPORATION, Petitioner, vs. A. C. ALLYN & CO., INC., and FIRST BOSTON CORPORATION, Respondents, SCHRODER-ROCKEFELLER & CO., INC., Defendant.	No. 455.

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

We believe the petition and the respondents' briefs fairly present the issues on this petition for a writ. But we must except from this a footnote contained on page 3 of the brief of respondent First Boston Corporation in which it is stated:

> "Subsequently, and prior to the petition herein, the petitioner served an amended complaint in this action against the defendant Schroder-Rockefeller & Co., Inc., in which the respondents are not named as defendants. It would thus appear that the respondents have been dropped from the action, with the result that the question presented on this petition has become moot."

We address ourselves to this. The District Court, at the same time it dismissed the complaint for lack of jurisdiction as against the respondents herein, dismissed the complaint as to defendant Schroder-Rockefeller & Co., Inc., with leave to amend. At the time it became necessary to file the amended complaint against Schroder-Rockefeller & Co., Inc., the Circuit Court of Appeals had affirmed the order of the District Court dismissing the complaint as to these respondents. As of that time these respondents were no longer parties to the complaint. No allegations concerning them would have been proper and their inclusion as defendants would have been in the face of the mandate of the Circuit Court. Necessarily they were no longer parties unless this Court granted a writ of certiorari and reversed the orders below. *Sutherlin* v. *Underwriters' Agency,* 53 Ga. 442; *McGaughey* v. *Latham,* 63 Ga. 71. To say under such circumstances that because respondents were not named in the amended complaint, they have been dropped and the question presented in the petition is moot, is to attempt to becloud the true issues with a conclusion that respondent knows is contrary to the facts.

Respectfully submitted,

JACOB K. JAVITS and
PERCIVAL E. JACKSON,
Counsel for Henry J. Ripperger, Petitioner.

October, 1940.

No. 455.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

HENRY J. RIPPERGER, as RECEIVER of UNITED STATES ELECTRIC POWER CORPORATION,
Petitioner,

vs.

A. C. ALLYN & CO., INC., and FIRST BOSTON CORPORATION,
Respondents,

and

SCHRODER-ROCKEFELLER CO. INC.,
Defendant.

BRIEF OF RESPONDENT A. C. ALLYN AND COMPANY, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

CLAIRE W. HARDY,
Attorney for Respondent
A. C. Allyn and Company, Inc.

MC CORNICK AND HENDERSON, INC., CHICAGO

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SUPREME COURT OF THE UNITED STATES

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Petitioner,

vs.

A. C. ALLYN & CO., INC., and FIRST BOSTON CORPORATION,
Respondents,

and

SCHRODER-ROCKEFELLER CO. INC.,
Defendant.

BRIEF OF RESPONDENT A. C. ALLYN AND COMPANY, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

OPINIONS BELOW.

The opinion of the United States Circuit Court of Appeals for the Second Circuit is reported in 113 Fed. (2d) 332, and appears in the Record at page 35. The opinion of the United States District Court for the Southern District of New York was not reported, but appears in the Record at page 28.

I.

STATEMENT OF THE CASE.

United States Electric Power Corporation is a Maryland corporation (R. 1). Petitioner has inadvertently stated that respondent A. C. Allyn and Company, Inc., is a Maryland corporation. As a matter of fact, it is a Delaware corporation (R. 2), and long before the institution by petitioner of his former action against respondent, it had been authorized to do business in New York and had designated the Secretary of State of New York as its agent upon whom process might be served (R. 2).

Petitioner neglects to state that in the suit he brought against respondent in the District of Delaware, upon the same causes of action as in his preceding suit in the Southern District of New York, he likewise joined therein another party defendant, which suit is at issue and pending trial (R. 3).

Subsequent to commencement of the suit in the Delaware District and following the decision of this Court in *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165, petitioner again sued respondent in the Southern District of New York upon the same causes of action set forth in the former suit in that Court, although he had abided the decision dismissing the complaint as to respondent in the former suit in that same district (R. 3).

For convenience the three suits instituted by the petitioner against respondent upon identical causes of action will be referred to as the "first New York suit", the "Delaware suit", and the "second New York suit".

The basis for Federal jurisdiction of the causes of action between the parties thereto was alleged to be diversity of citizenship between plaintiff and defendants (R. 2, Fol. 6).

QUESTION PRESENTED.

Respondent considers the question, for which review is sought, to be somewhat broader than as stated in the Petition for Certiorari; namely, it is whether the petitioner, having abided the decision of the United States District Court for the Southern District of New York dismissing the complaint and quashing service of the subpoena in his first New York suit for lack of jursidiction, as against this respondent, upon the ground of improper venue, is barred by that decision from again suing respondent in the same Court upon the same causes of action.

II.

SUMMARY OF ARGUMENT.

1. No conflict lies between the decision of the Circuit Court of Appeals for the Second Circuit in the instant case and any other Circuit. The only Federal Court decision rendered to the contrary was given in 1891 and has been repeatedly overruled by subsequent decisions of this Court.

2. The decision of the Circuit Court of Appeals for the Second Circuit is in strict conformity with the decisions of the Supreme Court and with the principle of *res judicata*.

ARGUMENT.

1. No conflict lies between the decision of the Circuit Court of Appeals for the Second Circuit in the instant case and any other circuit. The only federal court decision rendered to the contrary was given in 1891 and has been repeatedly overruled by subsequent decisions of this Court.

Petitioner relies upon the single case of *Rand* v. *United States*, 48 Fed. 357 in support of the claim that the decision of the instant case is in conflict with the decision of the Circuit Court of Appeals for the First Circuit. The *Rand* case was decided by a United States District Court, November 28, 1891. In that suit, the plaintiff sought recovery on a claim for fees for services as Commissioner of the Circuit Court which had been rejected by the Comptroller of the Treasury. The amount involved was $247.10, and was based upon many items falling into various classes of service. One class involved the sum of $17.00 which had been disallowed by the same Court in a former suit between the same plaintiff and defendant, 36 Fed. 671, upon the ground of lack of jurisdiction of the claim in

conformity with the interpretation in *Bliss* v. *United States,* 34 Fed. 781, of a then existing statute. The District Judge, in his opinion in the earlier *Rand* case, stated that the ~~lien~~ claim was rejected in order to conform with the opinion of the Circuit Court of the same Circuit rendered in the *Bliss* case. The plaintiff included the said item of $17.00 in his second suit. Subsequent to the decision in 36 Fed. 671, and prior to the decision rendered in 48 Fed. 357, the interpretation of the statute given in the *Bliss* case was reversed. In an opinion in the later case, dealing separately with each class of claim, and allowing the entire amount demanded, the District Judge stated (p. 358) he allowed the item upon the ground that its dismissal in the previous suit for want of jurisdiction, having been based upon an interpretation of the statute which was subsequently reversed, did not act as a bar to the claim. Upon appeal, the decision of the Court below was affirmed by the Circuit Court of Appeals without opinion (53 Fed. 348).

Whether or not review of the decision in the *Rand* case on the specific question of *res judicata* was sought in the Circuit Court of Appeals we are unable to state, but the ruling was made at a time when this Court had not passed upon the point involved, and all pertinent decisions of this Court have been to the contrary.

Stoll v. *Gottlieb,* 305 U. S. 165, 172;

Chicot County Drainage District v. *Baxter State Bank,* 308 U. S. 371, 374, 376, 377;

Baldwin v. *Iowa State Traveling Men's Assn.,* 283 U. S. 522, 524, 525, 526;

Sunshine Anthracite Coal Co. v. *Adkins,* 310 U. S. ....., 60 Sup. Ct. Rep. 907, 917;

American Surety Co. v. *Baldwin,* 287 U. S. 156, 166;

United States v. *Moser,* 266 U. S. 236, 242.

In *Stoll* v. *Gottlieb,* 305 U. S. 165, at page 172 this Court said:

> "After a Federal court has decided the question of jurisdiction over the parties as a contested issue, the court in which the plea of *res judicata* is made has not the power to inquire again into that jurisdictional fact."

In *Chicot County Drainage District* v. *Baxter State Bank,* 308 U. S. 371, at page 376, this Court stated:

> "The lower Federal courts are all courts of limited jurisdiction * * *. But none the less they are courts with authority, when parties are brought before them in accordance with the requirements of due process, to determine *whether or not* they have jurisdiction to entertain the cause and for this purpose to construe and apply the statute under which they are asked to act. *Their determination of such questions while open to direct review, may not be assailed collaterally.*" (Italics ours.)

The fact that the first New York suit was dismissed under an interpretation of Section 51 of the Judicial Code which was later determined by this Court in the *Neirbo* case to be erroneous, is immaterial to the point in issue.

> " * * * a fact, question or right distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or an erroneous application of the law."
>
> *United States* v. *Moser,* 266 U. S. 236, 242.

2. The decision of the Circuit Court of Appeals for the Second Circuit is in strict conformity with the decisions of the Supreme Court and with the principle of res judicata.

The principle of *res judicata* has been long established and its application to jurisdictional decisions as a bar to

a second suit between the same parties or their privies in the same court upon the same cause of action is wholly consistent with that principle.

In *American Surety Co.* v. *Baldwin,* 287 U. S. 156, at 166, decided in 1932, this Court said:

> "The principles of *res judicata* apply to questions of jurisdiction as well as to other issues." (Citing *Baldwin* v. *Iowa State Traveling Men's Assn.,* 283 U. S. 522) "They are given effect even where the proceeding in the Federal court is to enjoin the enforcement of a state judgment, if the issue was made and open to litigation in the original action, or was determined in an independent proceeding in the state courts. * * * The principles may apply, although the proceeding was begun by motion."

In *Chicot County Drainage District* v. *Baxter State Bank,* 308 U. S. 371, at 377, decided in 1940, this Court said:

> *"The court has the authority to pass upon its own jurisdiction and its decree sustaining jurisdiction against attack, while open to direct review, is res judicata in a collateral action."* (Italics ours.)

To similar effect are *Stoll* v. *Gottlieb,* 305 U. S. 165, 172; *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. ....., 60 Sup. Ct. Rep. 907, 917.

Examination of the cases holding jurisdictional decisions entered in prior suits between the same parties upon the same causes of action *not* to be *res judicata* discloses that (with the single exception of *Rand* v. *U. S., supra*) all were cases in which jurisdiction in the first suit had been denied either because of some defect of pleading, as a failure to allege proper jurisdictional grounds, or because the first suit had been laid in the wrong jurisdiction, and that in the subsequent suits the error of pleading was corrected

or the suit was laid in the proper jurisdiction. In other words, in each instance a different state of facts existed between the first and the second suits. It is, therefore, apparent that because of the change in the factual situation the principle of *res judicata* could not be applied as a bar to the subsequent suit. Such decisions are not in conflict with the decisions in the instant case.

It is to be noted that the opinion in the *Chicot* case at page 376 specifically states that a determination by the courts "*whether or not* they have jurisdiction" (Italics ours) is *res judicata.* This effectually disposes of petitioner's contention that decisions sustaining jurisdiction are *res judicata* but that decisions denying jurisdiction are not. As the Circuit Court of Appeals well said: "We think the argument ingenious but unsound." (R. 37)

Certainly there can be no element of equity in what is in effect the claim of petitioner, that having foregone his right of appeal from the decision in the first New York suit, and having put respondent to the inconvenience and expense of appearing and defending suit upon the same causes of action in the Delaware District Court, he may, without change in the factual situation between the parties, continue to harrass respondent by a second suit in the Southern District of New York upon the same causes of action. As was stated by this Court in *Stoll* v. *Gottlieb,* 305 U. S. 165, at page 172:

> "Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation."

Petitioner makes much of the claim that to permit the instant suit to be maintained in the District Court for the Southern District of New York against respondent will

enable him to join this action with the first New York suit and thereby avoid unnecessary litigation. This claim is made despite the fact that already a large amount of testimony and many exhibits have been introduced in evidence in pre-trial examination in that case, to which respondent is not a party, and despite the further fact that in the Delaware suit there is another defendant (R. 3), so that there would be no reduction in the number of suits in litigation.

III.

CONCLUSION.

The decision of the District Court and of the Circuit Court of Appeals in the instant case was proper and in accordance with prior decisions upon the same subject. That petitioner has failed to show any reason for the granting of a writ of certiorari herein. No novel question is presented, nor is there any ambiguity or uncertainty in the law which requires clarification. There has been no departure from the established rules of practice or of law, and the petition for writ of certiorari should be denied.

Respectfully submitted,

CLAIRE W. HARDY,
Counsel for Respondent,
A. C. Allyn and Company, Inc.

October, 1940.

Supreme Court of the United States

OCTOBER TERM—1940.

No. 455.

HENRY J. RIPPERGER, as Receiver of UNITED STATES ELECTRIC POWER CORPORATION,
Petitioner,

vs.

A. C. ALLYN & CO., INC., and FIRST BOSTON CORPORATION,
Respondents,

SCHRODER-ROCKEFELLER & CO., INC.,
Defendant.

BRIEF OF RESPONDENT FIRST BOSTON CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

JOHN C. BRUTON, JR.,
Counsel for Respondent
First Boston Corporation.

October, 1940.

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BRIEF OF RESPONDENT FIRST BOSTON CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Statement

The orders of the District Court (R. 5-10) and the decree affirming those orders (R. 38) which the petitioner seeks to have this Court review, hold that prior orders (R. 23, 24) of the United States District Court for the Southern District of New York dismissing an *identical* action against the respondents on the ground that the action was brought in the wrong district, are *res judicata* on the question of jurisdiction in the present action.

The petitioner is the Receiver of a Maryland corporation and is himself a resident of the State of Maryland.

The respondent, First Boston Corporation, is a Massachusetts corporation and is and has been since shortly after its incorporation qualified to do business in the State of New York. When the prior action was commenced against the respondents by the petitioner, the respondents moved to set aside the attempted service of the summons and complaint and to dismiss the complaint on the ground that the Southern District of New York was not the proper district in which the action should be brought. Those motions were granted and orders were entered setting aside the attempted service of the summons and complaint and dismissing the complaint.

The petitioner then instituted actions against the respondents and other defendants in the United States District Courts in Massachusetts and Delaware. Thereafter, this Court, in the case of *Neirbo Co.* v. *Bethlehem Shipbuilding Corp., Ltd.*, 308 U. S. 165, held that where a foreign corporation qualifies to do business in the State of New York, thereby designating an agent for the receipt of process, it waived its right to object to being sued in the Federal District Courts of New York.

Although he had not appealed from the prior order dismissing the complaint as against the respondents, and although the respondents *at the time the prior action was brought and dismissed* were qualified to do business in the State of New York, and had designated an agent for the receipt of process, a salient fact (R. 2) ignored by petitioner in his statement, the petitioner, after the decision of this Court in the *Neirbo* case, instituted the present action, again raising the identical question which had previously been determined. The District Court dismissed the complaint and set aside the attempted service of the sum-

mons and complaint on the ground that the prior order was *res judicata* on the question of jurisdiction and thus a conclusive determination of the issue raised. The Circuit Court of Appeals unanimously affirmed the order of the District Court.*

Opinion Below, Jurisdiction and Statute Involved

The citation of the opinion below, the jurisdiction of the Court, and the statute involved are set forth in the petition for writ of certiorari herein (p. 2).

Argument

POINT I

The question presented is a narrow one of no public interest, and the decision of the Circuit Court of Appeals clearly follows prior decisions of this Court.

The petition states that the decision of the Circuit Court of Appeals is not in harmony with the applicable rule as laid down by this Court and is in conflict with a decision of the Circuit Court of Appeals for the First Circuit (Petition, p. 5). These assertions by petitioner are plainly an attempt to state grounds which might justify this petition, where none in fact exist.

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*Subsequently, and prior to the petition herein, the petitioner served an amended complaint in this action against the defendant Schroder-Rockefeller & Co., Inc., in which the respondents are not named as defendants. It would thus appear that the respondents have been dropped from the action, with the result that the question presented on this petition has become moot.

This Court has held in no less than seven recent decisions that a judicial determination of the issue of jurisdiction in a cause is conclusive on that question, and invulnerable to collateral attack:

United States v. *Moser,* 266 U. S. 236;
Baldwin v. *Iowa State Traveling Men's Assn.,* 283 U. S. 522;
American Surety Company v. *Baldwin,* 287 U. S. 156;
Stoll v. *Gottlieb,* 305 U. S. 165;
Treinies v. *Sunshine Min. Co.,* 308 U. S. 66;
Chicot County Dist. v. *Baxter State Bank,* 308 U. S. 371;
Sunshine Anthracite Coal Co. v. *Adkins,* 310 U. S. —— (decided May 20, 1940).

The petitioner attempts to distinguish these decisions by contending that, while a determination on the issue of jurisdiction is conclusive where jurisdiction is sustained, a decision that jurisdiction is lacking in an action leaves the parties as though no action had been brought. Thus, according to the argument, an adverse decision on jurisdiction has no effect whatsoever upon the plaintiff's right to bring the same action all over again in the same court, any number of times, even though there has been no change in the facts upon which jurisdiction depends. The applicability of the principle of *res judicata* would thus be made to depend upon *which way* the question was decided—not upon *whether* the question was decided. As the Circuit Court stated in its opinion, the petitioner has presented no reason "why the rule should be less applicable to a decision denying jurisdiction than to one sustaining it".

Moreover, the opinions of this Court make it clear that the rule is as applicable one way as the other.

In *Stoll* v. *Gottlieb, supra,* this Court stated:

> "Where adversary parties appear, a court must have the power to determine *whether or not* it has jurisdiction of the person of a litigant, * * *." (Italics supplied.)

and in *Chicot County Dist.* v. *Baxter State Bank, supra,* the Court repeated:

> "The lower federal courts are all courts of limited jurisdiction, that is, with only the jurisdiction which Congress has prescribed. But none the less they are courts with authority, when parties are brought before them in accordance with the requirements of due process, to determine *whether or not* they have jurisdiction to entertain the cause and for this purpose to construe and apply the statute under which they are asked to act. Their determinations of *such* questions, while open to direct review, may not be assailed collaterally." (Italics supplied.)

The decision of the Circuit Court of Appeals is manifestly in harmony with and follows the foregoing decisions by this Court.

All of the decisions cited by the petitioner as supporting his contentions, with the possible exception of the case of *United States* v. *Rand,* 53 Fed. 348, are wholly unrelated to the present question. Either the decision on the question of jurisdiction in the first action was pleaded as a bar in a subsequent action in a different forum as *res judicata* on the merits (obviously improper) as in *Hughes* v. *United States,* 71 U. S. 232, or there had been an omission, in the prior action, to allege essential and material

jurisdictional facts, as in *Smith* v. *McNeal,* 109 U. S. 426. These cases have no bearing on the present question, as the Circuit Court of Appeals correctly pointed out (R. 37).

The petitioner states that the case of *United States* v. *Rand, supra,* presents a conflict between the decisions of the Circuit Court of Appeals for the First Circuit in that case and the court below in the case at bar. The *Rand* case* was decided in 1892. The decision contains no discussion of the point here involved, and of course was decided many years prior to the decisions of this Court which were followed by the Circuit Court of Appeals in making the decree which the petitioner seeks to have the Court review.

POINT II

The decision of the Circuit Court was necessary to put an end to litigation and is in strict conformity with the purpose of the principle of *res judicata.*

The petitioner fails to state to the Court that in the actions instituted in the United States District Court for the District of Massachusetts against the respondent, First Boston Corporation, and in the United States District Court for the District of Delaware against the respondent, A. C. Allyn & Co., Inc., after the first order of the District Court dismissing the complaint as against the respondents, *other defendants, not parties to the New York action, are joined* (R. 3). After the institution of those

*The amount involved on this point was a claim for $17 against the United States.

actions respondents necessarily engaged counsel and prepared for the trial of the actions in the Massachusetts and Delaware District Courts. Those actions have been at issue for some time and in at least one of them (the Massachusetts action) pre-trial hearings have commenced. The present action in New York is the third action commenced by the petitioner against these respondents. The effect of the attempt to maintain this action is not simply double vexation, but in substance triple vexation for the same cause. Petitioner's statement that the effect of the holding of the Circuit Court is "to compel the petitioner to pursue his remedy in three different forums instead of trying the whole case in the United States District Court for the Southern District of New York" gives rise to an entirely false inference. Since other defendants are parties to the Massachusetts and Delaware actions, those actions will necessarily continue, even though the respondents are also joined in the New York action. The effect of a holding contrary to that of the Circuit Court would not be to put an end to litigation, but rather would be to subject the respondents to identical actions in two different District Courts.

POINT III

Conclusion.

The decision of the Circuit Court below follows and applies the established rules laid down by this Court. The decision moreover presents a clear case where the purpose of the principle of *res judicata,* namely, to put an end to

litigation, could lead to no result other than that reached by the court below.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied, with costs.

Respectfully submitted,

JOHN C. BRUTON, JR.,
Counsel for Respondent
First Boston Corporation.

October, 1940.